IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

Number 831

STELLA T. RAMBO et al.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

and

BRIEF IN SUPPORT.

GEORGE C. SPENCE,
Citizens & Southern National Bank Building,
Atlanta 3, Georgia,
EDGAR WATKINS,
1207 Citizens & Southern National Bank Building,
Atlanta 3, Georgia,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. Stella T. Rambo; Holland Realty Company, a corporation; Mrs. Regina Rambo Benson, Executrix of the Estate of Dr. W. E. Benson and guardian of her minor children, Warren Benson and Regina Anne Benson; Mrs. Lucien Lamar Knight; Dr. Dan Y. Sage; John M. Berry; William Tate Holland, Executor of the Estate of Mrs. Mary T. Holland; George M. Brown, Executor of the Estate of George M. Brown, Jr.; Security Trust Company, Administrator; Lindsey Hopkins, Sr.; Mrs. Stewart Shaw, formerly Northcutt; Steve White; Dr. L. H. Muse; George N. Lemmon;

F. C. Lewis; L. Roy Collins; Mrs. M. M. Parks; J. W. Hutchinson, Executor of the Estate of Mrs. John W. Hutchinson; J. L. Vickery; Mrs. J. A. Metcalf; Mrs. H. S. Willingham, sole heir of H. S. Willingham; Roy McCleskey; H. Y. McCord; Citizens and Southern National Bank, Executor; W. B. Hamby, and Marian Kingdon, respectfully pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered November 14, 1944 (R. 170), sustaining the judgment of the District Court of the United States for the Northern District of Georgia (R. 56).

STATEMENT OF THE CASE.

The opinion of the Circuit Court of Appeals (R. 170) has not yet been reported. The opinion and judgment of the court below, not reported, appear in the record, pages 46-56, inclusive.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 14, 1944, and the mandate was stayed for sixty days ~~thereafter~~ November 24, 1944. The jurisdiction of this Court is given by **Judicial Code, Section 240, U. S. Code, Title 28, Section 347.**

THE STATUTES INVOLVED.

The United States brought a condemnation proceeding for the land involved in this cause under **United States Code, Title 40, Sections 257, 258,** permitted under the **Georgia Code, Sections 36-1101 to 36-1116.**

Jurisdiction in this partition suit is granted by **Subsection 25 of Section 41 of Title 28, United States Code,** and authorized by **Georgia Code Sections 85-1501 ff.**

SUMMARY STATEMENT.

The common source of title of the land involved in this cause is the Kennesaw Mountain Battlefield Association, a corporation. That Association deeded the land in trust to secure a certain bond issue, and for the use and benefit of the holders of such bonds in proportion to their respective holdings. This deed was foreclosed, and the title decreed out of the Association, leaving the equitable title in the Trustee. Under the Statute of Uses in Georgia, **Code** of Georgia 108-112, 108-114, the equitable title in the Trustee was made a legal title in the beneficiaries of the trust. Petitioners in this cause owned about 96% of the bonds, and by virtue thereof became the owner of 96% of the title.

The United States filed a condemnation suit to condemn the title to all of the property. In this condemnation suit, the plaintiffs below, petitioners here, were neither sued nor served, although respondent claims they were included in a class bill, and also served by publication.

After the condemnation proceedings brought by the United States, in which it obtained, as is conceded, the title of those bondholders sued and served, the petitioners here asked leave to intervene, to set up title to their portion of the land. This petition to intervene was denied by the District Court, and an appeal taken to the Circuit Court of Appeals. In the Circuit Court of Appeals, **Rambo v. United States, 117 Fed. (2) 792**, the Court, holding that the right to intervene was within the discretion of the trial court said:

> "We do not pass upon the merits * * * if we assume, as appellants contend, that they were the owners of the land and not represented in the suit, they have not been deprived of any rights they possess, for the judgment in the condemnation case would not be binding as to them."

Petitioners, acting on the statement of the Court of Appeals that they were not deprived of their rights by a suit to which they were not parties, and recognizing that the United States did own some 4% of the lands, filed this partition suit in equity, in which they asked for partition, and in view of the fact that the land could not be partitioned in kind, that the court of equity sell the land and distribute the funds among the respective owners. (See **Georgia Code, 85-1501, ff.)**

When the United States had been served with this partition suit, they filed a motion to dismiss on the ground,

> "* * * because the complaint fails to state a claim against this defendant upon which the relief prayed for can be granted" (R. 19).

A supplemental motion was later filed by the United States on the ground that the Court was without jurisdiction in that the title and possession of the land had been acquired by virtue of the condemnation proceedings, and that the United States under the condemnation decree had taken possession (R. 21). These motions were overruled by the District Judge, who gave as a reason therefor that the motion to dismiss "was not the proper remedy under the averments of the petition" (R. 47).

The trial Judge, after the parties had stipulated the facts, and after a hearing thereon, dismissed the bill for partition, saying:

> "The complaint in this case fails to establish under the Federal law a proceeding for partition in equity and plaintiff's remedy is to prosecute their claims in the Court of Claims as provided by statute (Hurley v. Kincaid, 285 U. S. 95).
>
> "Since plaintiffs have a plain, adequate and complete remedy at law and the present proceeding is not a proceeding in equity for partition and the United States have not consented to be sued therein, the bill must be dismissed" (R. 55, 56).

The facts were stipulated, and both the trial court and the Court of Appeals refused to consider any other than the question of jurisdiction, which is the question presented here.

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals is brief, and after affirming the lower court on the ground that no partition suit lies where the defendant in partition files an answer setting up a claim of possession and title for the land, said:

> "It is unnecessary to discuss the other questions involved, * * *"

See this opinion, R. 170.

QUESTIONS PRESENTED.

While there are questions undecided, the facts are undisputed, and so far as the decision of the Circuit Court of Appeals goes, the only issue here is:

> **Where Jurisdiction to Partition in Equity Exists, and the Allegations Are That the Plaintiffs and the United States Are Tenants in Common, Is Such Jurisdiction Lost Because the United States Pleads That Under the Decree of Condemnation It Obtained Title and Took Possession of the Land Sought to Be Partitioned?**

Subordinate to this question, is the question:

> **When Equity Has Taken Jurisdiction of a Proceeding, Is That Jurisdiction Taken Away Where Defendant, Relying on the Judgment Claimed to Be Void, Denies Plaintiff's Title?**

REASONS FOR GRANTING THE WRIT.

1. **The Circuit Court of Appeals Decided an Important Question of Federal Law in a Manner Which Conflicts With the Applicable Decisions of This Court and With the Decisions of the Circuit Courts of Appeals of Other Circuits, and With the Decisions of Most, If Not All, of the States of the Union.**

(a) It is an established rule in equity that when equity has taken jurisdiction of a cause it will retain such jurisdiction and do full equity, even if called upon in the course of so doing to determine legal rights. A leading case on this point is that of **McGowen v. Parrish, 237 U. S. 285,** and as the principle is so universally accepted and so well known to the Court, further cases on this point will not be cited here.

(b) The Circuit Court of Appeals disregarded many decisions of this Court in holding that where the petition shows jurisdiction, that jurisdiction is lost by a denial of the allegation of the petition.

(c) The Circuit Court of Appeals failed to follow the rule that when any party, including the United States, comes into Court and relies upon a judgment therein rendered, it has so far consented as to permit the same court to determine the validity and meaning of the judgment under which the United States claims. See, as typical of this line of decisions: **Taylor v. Leesnitzer, 37 App. D. C. 358; Goddman v. Redd, 34 App. D. C. 521; Williams v. Payne, 7 App. D. C. 143,** and numerous state cases, of which three are typical: **Griffin v. Griffin, 33 Ga. 107; Griffin v. Griffin, 153 Ga. 547; Pillow v. Southeastern etc. Improvement Company, 92 Va. 144.**

In **The Siren v. United States, 7 Wall. 152, 154**, where this Court said:

> "When the United States institute a suit they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable * * * they then stand in such proceedings with reference to the rights of defendant and claimant precisely as private suitors, except they are free from costs and affirmative relief against them beyond demand of property in controversy."

We do not here cite other cases which could be cited to the same effect.

(d) The Circuit Court of Appeals erred in holding that the suit brought by petitioners was not maintainable because there was a claim of title contrary to the allegations in the complaint. Even if the answer raised a question for a court of law, which it does not because the facts were stipulated, the Court should have followed the general chancery rule which permits a court of equity to refer a question which may arise in an equitable proceeding to a jury where the facts are in issue, or decide for itself where the facts are undisputed. The question of so submitting the issue of law, if one arose, is not a jurisdictional, but a procedural question. (See **Burt v. Hellyar, L. R. A., 15 Eq. 160; Krippendorf v. Hyde, 110 U. S. 276; Story, Equity Pleadings, Sections 426, 427.)**

2. **The Question Decided by the Circuit Court of Appeals for the Fifth Circuit Is One of General Importance, in That It Relates to the Construction of a Federal Statute, the Application of the Due Process Clauses of the Constitution, and a Determination of Whether or Not the United States, Without Service on All the Owners, Can, by Serving Part Thereof and Pleading That They Thus Got Title to All the Property, Prevent Any Relief to the Owners Not Sued or Served.**

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted, and the judgment of that Court revised and reversed.

GEORGE C. SPENCE,

EDGAR WATKINS,
Attorneys for Petitioners.

Addresses:

GEORGE C. SPENCE,
Citizens & Southern National
Bank Building,
Atlanta, 3, Georgia.

EDGAR WATKINS,
1207 Citizens & Southern National
Bank Building,
Atlanta, 3, Georgia.

IN THE

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STELLA T. RAMBO et al.,
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UNITED STATES OF AMERICA,
Respondent.

BRIEF

In Support of Petition for Certiorari.

Jurisdiction in this Court and the particular errors relied on are stated in the preceding petition for the writ. This brief presents argument and cites authorities in support of that petition.

I. THE PLEADINGS AND STIPULATED FACTS.

(a) **Motion to Dismiss:** Petitioners in their complaint and amendments thereto in the District Court specifically set out the interest each petitioner owned, that they were tenants in common with the United States and others, that the land was not susceptible to partition in kind, and prayed that the equitable procedure of partition by sale be had (R. 10-18). These issues were not considered either in the District Court or the Circuit Court of Appeals (District Court opinion, R. 46 to 56; Circuit Court opinion, R. 170).

The United States made a motion to dismiss, claiming failure to state "a claim against the defendant" (R. 19). A supplemental motion to dismiss was filed, claiming that the Court was "without jurisdiction of this complaint in that the title and possession of the described land, and full and complete ownership thereof, was acquired by this defendant by virtue of condemnation proceedings prior to the filing of such complaint, said possession and said title and complete ownership dating from May the 19th, 1939, when this defendant deposited the amount of the award, representing the adjudicated value of said land in said condemnation proceedings into the registry of the Court * * *" (R. 21).

(b) **Facts**: The facts were agreed on and directly, or by reference, stated in stipulations (R. 25-34). Attached to these stipulations are the orders relating to the service in the condemnation suit at law brought by the United States and the judgment under which it claims title and possession of all the land sought to be partitioned (R. 35-46).

The abstract of the testimony is found in Record, pages 56-76. Defendants, respondents here, in the record on appeal to the Circuit Court of Appeals, added to this record, without any necessity, thus largely increasing the cost of appeal to petitioners, contrary, we submit, to an appropriate procedure on appeal. This useless amplification of the record is found at pages 77 to 152.

(c) **Petitioners' Title**: The record shows petitioners' chain of title from a common source. This record presents no issue of fact, and both the lower courts refused to pass on the legal effect of the undisputed facts.

We do not deem it necessary, certainly not as the issue has not been considered in the Courts below, to discuss petitioners' title. Sufficient now is to show that from the common source of title, petitioners, by a strict foreclosure and the statute of uses, became the owners of their respective portions. (Cf. **Flagg v. Walker, 113 U. S. 659; Code of**

Georgia, 108-112, 108-114; Caldwell v. Hill, 179 Ga. 417, 424, 425.)

It was claimed in the answer to the complaint, but not considered by either of the Courts below, that by the condemnation proceeding, the title of petitioners was vested in the United States. This claim was based on the contention that petitioners were served by serving one of a class of some thirty-five owners. One member of a class so large is not a legal representation. The "practice, pleadings, forms and modes of proceedings," in condemnation suits by the United States, must "conform as near as may be" to that in Georgia **(40 U. S. Code, 257, 258)**. The only class representative sued owned less than 4 per cent, and he made no appearance. This is no fair representation. The Supreme Court of Georgia held that two representatives was the minimum. **Macon R. R. v. Gibson, 85 Ga. 1, 23, 24.** In the English practice, as said by Story **(Equity Pleadings, Section 123, page 136)**, "so many must be joined, as will fairly and honestly try the legal right." Lord Eldon is cited by Story **(Note 3, same page)**, as saying: "The Court, therefore, has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff."

Having sought to serve petitioners by a class bill, all other forms of service are excluded, but there was an omnibus service. Petitioners were not named in any form of service (R. 50), although the trial Court, when referring to the owners of the land, said:

> "* * * many of them were residents of Cobb and Fulton Counties where the proceedings were advertised and widely known" (R. 52).

Even had this service by publication been directed to petitioners, it was not had according to the statutes of Georgia. The publication was for one week, which, under Georgia law, applies to appointments of assessors, and no assessors were here appointed. The United States filed a plenary

suit at law, which required preliminary negotiations, none of which were had with petitioners, and where service is had by publication, the notice must be published "twice a month for two months" **(Georgia Code, 81-205, 206).** The Supreme Court of Georgia, in **Stiles v. Stiles, 183 Ga. 199, at page 204,** speaking of **Sections 81-206 and 81-207,** said they are

> "jurisdictional and they must be strictly and literally complied with. * * * failure to comply with such requirements before judgment renders the judgment void."

The trial Court, speaking of petitioners, found "many of them were residents of Cobb and Fulton Counties where the proceedings were advertised and widely known" (R. 51, 52).

Unless this Court, which it could without conflicting with the decision in **Slocum v. New York, etc., Insurance Company, 228 U. S. 364,** should, on the undisputed facts, direct a decree of partition and sale, the only issue is one of jurisdiction, and therefore we do not argue the other issues here. The facts are alleged, and on the motion to dismiss are presumed to be true.

II. SUMMARY OF ARGUMENT.

The question of law here presented is:

> **Where a Suit in Equity for Partition Alleges, as Was Adjudicated, the Necessary Jurisdictional Facts, Should Jurisdiction Be Abandoned on the Coming of a Plea of Title?**

The answer for which we contend is "No," because:

The statute literally gives the Court jurisdiction. Appropriate "facts stated in that bill" show, as was adjudicated by the District Court, that jurisdiction existed.

Jurisdiction so shown is not lost by a claim of title.

The proceeding being in equity, a court of equity may determine questions of law, certainly in this case where such issue, if it exists, arises as the decree under which the claim of title is based.

A wrong rule of construction was adopted in the Courts below.

III. THE STATUTE, CONSTRUED LITERALLY, GIVES JURISDICTION.

This is a suit in equity brought by a tenant in common for the partition of lands in a case where the United States are of such tenants. **[Title 28, U. S. Code, Section 41 (25).]**

IV. "FACTS STATED IN THE BILL" DETERMINE JURISDICTION.

> "The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill."
>
> **(Schoenthal v. Irving Trust Company, 287 U. S. 92, 95.)**

> "The settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."
>
> **(American Life Ins. Co. v. Stewart, 300 U. S. 203, 215.)**

Whether or not there is an adequate remedy at law, you "assume the allegations" in the bill are true. **(Petroleum Exploration, Inc., v. Public Service Commission, 304 U. S. 209, 216, 217.)**

We need not extend, as we could, references to similar statements in the decisions of this and other courts.

V. JURISDICTION OF A SUIT IN EQUITY FOR PARTITION IS NOT LOST BY A DEFENDANT'S CLAIM OF TITLE.

Parties to this suit, being tenants in common of the land here sought to be partitioned, and the United States having specifically consented to being sued in equity in partition suits, this Court has jurisdiction.

The United States contended, and the lower court agreed, that their claim of a token possession and title, arising from the answer, deprived the Court of jurisdiction. This claim, if it had presented an issue of fact, would have permitted the Court to send to the law side of the court such issue. **(Clark v. Roller, 199 U. S. 541.)**

In Georgia, as in the United States, "the powers of the courts of law and equity are exercised by the same persons."

In **Griffin v. Griffin, 33 Ga. 107, same title, 153 Ga. 547,** there was a definite plea "that applicant was not a cotenant." Upon that plea the Supreme Court of Georgia said:

> "Upon an application to the Superior Court for partition of land by joint tenant, or tenant in common, under the Act of March 26, 1867, it is proper for that Court, in case of a contest, to go into a consideration of the title, both legal and equitable, and award or refuse the writ, according to the proof made."

Under the old Chancery Rule, where equitable and legal rights were determined in different courts, the rule was the same when the issue was, as here, on the construction of a writing:

> "A chancellor in a suit in equity can determine a question of law based on the construction of writings as well as a judge sitting in a court of law trying an action of ejectment. Brandon v. McKinney, 233 Pa.

481, 82 A. 764 (2). It would cause unnecessary delay and expense to apply the rule requiring title to be first tried at law" **(Galbraith v. Bowen, 5 Pa. Dist. 352).**

Under the Chancery Rule in England, the refusal to permit partition when title was involved was not one of jurisdiction, but a mere procedural rule. The English rule was stated:

> "The reason for remitting the investigation to a common-law court is one of policy and fitness, rather than of inherent want of power in a court of equity * * *" **(Burt v. Hellyar, L. R. A., 15 Eq. 160).**

In Virginia, the Court said:

> " 'To hold otherwise would nullify the statute, (1) and compel a resort to law to try title in every case in which the **defendant set up title in himself,** a result the statute was designed to prevent.' Claughton v. Claughton, 70 Miss. 384, 387, 12 S. 340 (2). 'If the jurisdiction of the Circuit Court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed.' "

See, also, **Weston v. Stoddard, 137 N. Y. 119, 20 L. R. A. 624, 629, 630 (1893); United States v. Steamer Siren, 74 U. S., 7 Wall. 152, at page 154.**

In substance, this is for jurisdictional purposes supplemental to the suit of the United States, the judgment in which being for construction. This follows from the discussion in Story's Equity Pleading, where, in discussing Bills Impeaching Decrees, he said:

> "There is no doubt of the jurisdiction of Courts of Equity to grant relief against a former decree, where the same has been obtained by fraud and imposition, * * *. A decree obtained without making those per-

sons parties to the suit, in which it is had, whose rights are affected thereby, is fraudulent and void as to those parties."

Such possession as the United States have is based on the condemnation decree, and derives from the same common source as the claim of plaintiffs. The Supreme Court of Georgia, in deciding a similar issue, said:

> "She (the defendant) is therefore lawfully in possession as a tenant in common with the plaintiffs. This being true, she is not subject to be sued in ejectment, or in any other action brought to recover possession at the instance of her co-tenants, simply because she has received more than her share of the income or profits of the land. * * * The remedy given to them, if she is in possession of more than her share of the premises, or if she has received more than her share of the income and profits, is an application for an accounting, or for partition." (Parentheses ours.) **Daniel v. Daniel, 102 Ga. 181, 184.**

VI. THIS IS A PROCEEDING IN EQUITY, AND THE COURT HAS JURISDICTION TO DECIDE ALL ISSUES AND TO GRANT FULL RELIEF.

The lower court's conclusion of law on this point is: "The present proceeding is not a proceeding in equity for partition" (R. 56).

The description of an equitable partition by this Court is here conclusive. You quoted Lorde Redesdale in his work on Pleadings in Chancery, as follows:

> " 'In the case of the partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partition, which are effected by first ascertaining the right of the several persons interested, and then issuing a commission to make the partition re-

quired, and upon the return of the commission and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotment made to the several parties.'" **Gay v. Parport, 106 U. S., 16 Otto 679, 690, 691.**

Later Chancery Courts adopted the plan of having a commissioner sell the whole tract. See also, **Georgia Code Sections 85-1301 to 85-1515**, cited by Supreme Court of Georgia in **Nixon v. Nixon, 197 Ga. 426.**

The courts below, in this case, we submit, by an unauthorized construction, failed to apply the rules above.

VII. THE COURTS BELOW ERRED IN THE RULE OF STATUTORY CONSTRUCTION.

The rule of construction which should have been adopted was stated by this Court as follows:

> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." **(Knowlton v. Moore, 178 U. S. 41, 77.)**

The Courts below should have adopted the rule applied in **United States v. Lee, 106 U. S. 196.** Brief quotations from that opinion are pertinent. At page 210:

> "* * * it certainly can never be alleged that a mere suggestion of title in a State, to property in possession of an individual, must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

There, while in form the United States were not sued, in substance they were, and in denying the claim that no jurisdiction existed, the Court, page 220, said:

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

(Cf. the excellent discussion of this case by **Warren**, in his **History of the Supreme Court, Vol. 3, pages 393 to 397**, and note his citation of the case of the stubborn miller against Frederick the Great, at page 397, and his description of the decision in the Lee case, pages 395, 396, "as one of the glories of American Law.")

Here a suit for partition in equity was filed, and the statute clearly authorizes such suit, and the trial judge, on a motion to dismiss, so held (R. 47). The Court below found no ambiguity, but by construction, because by answer the sovereign claimed title, made an exception to the statute. And this in a suit clearly alleging jurisdiction. Such an addition to the statute is not sound and works an injustice.

What is called in **Wallace v. United States, 142 Fed. (2) 240, 243**, a "niggardly rule," is contrary to the public conscience, has been modified in suits on contract, express or implied, and the American Bar is now seeking further modification to include tort suits. The rule itself is but a vermiform appendix, a vestige of the archaic and abandoned concept of a king as ruling by divine right, a vice-god who can do no wrong. Such a rule is in conflict with democracy and grew up from decisions of judges. However, here the United States have literally given consent to be sued in this case, and all we ask is that the consent be not set aside, as it was in the Courts below, by an unauthorized construction.

Wherefore, petitioners pray that their prayer for the writ of certiorari be granted and the judgment of the Circuit Court of Appeals be reversed.

GEORGE C. SPENCE,

EDGAR WATKINS,

Attorneys for Petitioners.

Addresses:

GEORGE C. SPENCE,
Citizens & Southern National
Bank Building,
Atlanta, 3, Georgia.

EDGAR WATKINS,
1207 Citizens & Southern National
Bank Building,
Atlanta, 3, Georgia.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 831

STELLA T. RAMBO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court appear in the record at pages 46–57. The opinion of the Circuit Court of Appeals (R. 169–172) is reported in 145 F. 2d 670.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944 (R. 172). The petition for a writ of certiorari was filed on January 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25), which confers jurisdiction on the district courts "of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants", authorizes suit against the United States where it is in possession of land under a claim of exclusive title.

STATUTE INVOLVED

Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25), provides:

The District Courts shall have original jurisdiction as follows:

> Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

STATEMENT

This partition suit was instituted in April 1941 against the United States and others under Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25) (R. 10–18). All of the land here involved formerly belonged to the Kennesaw Mountain Battlefield Association and had been deeded in trust to the Atlanta Trust Company in

1924 to secure certain bonds issued by the Association (R. 32, 48, 77–89). In 1927, a default in interest payments having occurred, the Superior Court for Cobb County, Georgia, at the request of two bondholders and the Atlanta Trust Company, appointed receivers (R. 48, 89–106). On October 11, 1927, the Atlanta Trust Company was granted a decree of foreclosure and the trustees were directed to retain possession of the premises "subject to such further order as the Court may enter" (R. 107).

Thereafter, the receivership remained in effect (R. 26, 50; see R. 108–115). However, no action was taken by the state court, the trustee, or the receivers to sell the property until March 1935 when the receivers sought and received permission from the court to negotiate for the sale of the property to the United States (R. 111; see also R. 112–115). In February 1936 they obtained permission to reject the Government's offer of purchase (R. 115–118).

On May 28, 1936, the United States instituted proceedings to condemn the land (R. 128–132). In that proceeding service was obtained upon, among others, the Kennesaw Mountain Battlefield Association; the receivers; the Atlanta Trust Company, trustee; William Tate Holland, individually and as President of the Kennesaw Mountain Battlefield Association; and E. D. C. Hames, one of the plaintiffs in the foreclosure proceedings, as

representative of the bondholders (R. 133–135). Petitioners here, who were also bondholders, were not personally served (cf. R. 26).

The receivers, pursuant to state court authority, appeared and defended the condemnation proceedings (R. 118–128, 140–142). Holland, individually, and as president of the Association, purporting to represent a large majority of the outstanding bondholders, also appeared and participated (R. 138–140). A jury trial was had and a verdict was returned in the sum of $9,000 (R. 142) which the court increased by additum to $16,000 (R. 143–144). An appeal was taken by both parties to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the $16,000 judgment. *United States* v. *Kennesaw Mountain Battlefield Association,* 99 F. 2d 830 (1938). The Association and the receivers then unsuccessfully petitioned this Court for a writ of certiorari. 306 U. S. 646.

On May 8, 1939, judgment was entered on the mandate of the Circuit Court of Appeals, and on May 19, 1939, the Government having deposited the amount of the award, final judgment was entered vesting title in the United States (R. 152–153). On June 10, 1939, four of the bondholders, who are the principal claimants in the present proceeding, filed a petition for leave to intervene on the grounds that they had not been individually served in the condemnation action, and that as

part owners or tenants in common, they were entitled to be heard on the assessment of damages. The trial court refused to grant the petition to intervene, and the Circuit Court of Appeals affirmed on the ground that the denial of intervention was within the sound discretion of the trial court since, if they were owners and not represented in the condemnation proceeding, the judgment would not be binding on them. The court pointed out that the bondholders seeking to intervene did not allege or contend they had no knowledge of the condemnation proceedings, that although they lived in the same town where notice was published and appeared to be closely identified with Holland, who took an active part in the proceedings, they sat by during the trial and waited until two appeals had been taken, judgment entered and the award paid into court before asserting their alleged rights. The court also stated that it was "impressed with the argument that the intervenors here were fully and fairly represented [by the state court receivers and the trustees for the bondholders] in the original suit filed by the government to condemn the lands in question." *Rambo* v. *United States,* 117 F. 2d 792, 794 (1941).

Relying on 28 U. S. C. 41 (25), plaintiffs thereupon brought the present proceeding to "partition" the land which the Government had condemned. Their suit was based upon the claim that

the foreclosure decree in the state court (R. 107) was a "strict foreclosure" resulting in a dry trust so that title immediately passed to them as bondholders by virtue of what the trial court characterized as a "very doubtful application of the statute of uses" (cf. R. 52, 53; Pet. 3, 10; see also *Rambo* v. *United States*, 117 F. 2d 792, 793). Therefore, since they were not served individually on the condemnation proceeding, it was urged that they were not divested of their title by the judgment in those proceedings and that the United States acquired title only to the interests of those bondholders who were individually served, thus becoming a tenant in common with petitioners (R. 52).[1]

A motion to dismiss was filed by the United States on May 9, 1941, on the ground that the complaint failed to state a claim against the defendant upon which the relief prayed for could be granted (R. 19). On June 5, 1941, the parties stipulated that the land involved in the present case was the same land included in the earlier condemnation proceedings, that since June 7, 1939, the United States "claims to have been in the actual, exclusive, adverse, notorious and uninterrupted posses-

[1] Petitioners state that the United States contends that they were served by service of notice on one of the bondholders as a representative of a class and by publication of notice, giving the impression that these are the only contentions of the Government (See Pet. 3, 11). The Government has also contended, however, that petitioners were represented in the condemnation proceeding by the receivers and the trustee. (See R. 52; see also *Rambo* v. *United States*, 117 F. 2d 792).

sion of said land," that the United States had incorporated the land into the Kennesaw Mountain National Battlefield Park administered by the National Park Service, that the United States had placed warning signs on the land stating it was "United States Government Property," and that no one has attempted in any way to interfere with its possession and use of the land (R. 25–31). Subsequently, the United States filed a supplemental motion to dismiss the petition upon the ground that the court had no jurisdiction of the action (R. 19–22).

The motions for dismissal were overruled by the court on December 5, 1941, the trial judge being of the view that the petition raised factual issues which could be decided only on motion for summary judgment (cf. R. 47). Such a motion was thereupon filed, along with an answer challenging the court's jurisdiction and asserting that the issues were *res judicata* (R. 22–25). On October 29, 1943, the court dismissed the bill "for want of equity and lack of jurisdiction" (R. 46–56).

Upon appeal the Circuit Court of Appeals affirmed, holding that the United States has not by virtue of section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25) consented to try the title to land claimed by it in a suit to partition where the plaintiff is not in possession and his claim of title is denied.

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ARGUMENT

Suits against the United States, or against property of the United States, cannot be maintained in the absence of consent by Congress. *Minnesota* v. *United States,* 305 U. S. 382, 386–387; *United States* v. *Shaw,* 309 U. S. 495, 500. Section 24, paragraph 25 of the Judicial Code, relied on by petitioners as giving such consent (Pet. 2, 13), confers jurisdiction on the district courts of "suits in equity" for "partition" by a "tenant in common or joint tenant" of land so held by the United States. While these words are not defined in the statute it is well-settled that "language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Merriam,* 263 U. S. 179, 187. The phrase "suits in equity" is elwhere used in the Judicial Code, having originally been employed in the Judiciary Act of 1789. See 28 U. S. C. sec. 41 (1). The equity jurisdiction thus conferred on the inferior federal courts is that exercised by the High Court of Chancery of England at the time of the separation of the two countries. *Matthews* v. *Rodgers,* 284 U. S. 521, 529; *Atlas Ins. Co.* v. *Southern, Inc.,* 306 U. S. 563, 568; cf. *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 164–165; *Gay* v. *Parpart,* 106 U. S. 679, 689; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 280. And the principle is equally

settled that statutes relaxing sovereign immunity from suit must not be liberally construed. *United States* v. *Sherwood,* 312 U. S. 584, 590; *United States* v. *Michel,* 282 U. S. 656, 659 (1931).

Applying these rules of construction, Section 24 paragraph 25 of the Judicial Code does not confer jurisdiction on the district court (1) because at common law a disseised co-tenant may not bring a writ of partition, and (2) because at common law the plaintiff in an equity partition suit must have a clear legal title.

1. The fundamental and common feature of all forms of cotenancy is unity of possession. I Tiffany, *Real Property* (2d ed. 1920), p. 626. "The refusal to let a cotenant into possession, with knowledge of his claim of title, accompanied by a denial thereof, constitutes an ouster." *Id.,* p. 673. No bill in equity for partition can be maintained by a plaintiff who has been "ousted," and who is not in possession with the other alleged co-tenants. *Hipp* v. *Babin,* 19 How. 271, 279; *Sanders* v. *Devereux,* 60 Fed. 311 (C. C. A. 8); *Frey* v. *Willoughby,* 63 Fed. 865 (C. C. A. 8); *Rich* v. *Bray,* 37 Fed. 273, 277 (C. C. W. D. Mo.); *Holton* v. *Guinn,* 65 Fed. 450, 454 (C. C. W. D. Mo.); *Bearden* v. *Benner,* 120 Fed. 690, 693 (C. C. S. D. Ga.). The rule is well summarized in *Rich* v. *Bray, supra,* where the court said (p. 277):

> * * * Where there is an adverse holding under claim of exclusive right, amount-

> ing to an ouster among tenants in common, it destroys the unity of possession, and takes away the right of partition. Resort must first be had to the action of ejectment at law.

The record in this case shows that the Government claims the exclusive ownership of this property (R. 23), and that "the United States had been in continuous and adverse possession of the land" since May 19, 1939 (R. 47–48), "claiming the entire title" (R. 55). The record further shows that the Government has incorporated this land into the Kennesaw Mountain Battlefield Park, that improvements have been made thereon, and that signs have been erected declaring this land to be "United States Government property" (R. 28–30). These acts clearly amount to an ouster, and thus preclude a suit for partition.

2. In the High Court of Chancery of England and in the federal courts the scope and purpose of a suit in equity for partition has historically been limited to the division among the parties of land in which they had legal interests or estates that were not in controvery. *Guy* v. *Parpart,* 106 U. S. 679, 689; *Lessee of McCall* v. *Carpenter,* 18 How. 297, 302; Clark v. Roller 199 U. S. 541, 545; *Bearden* v *Benner,* 120 Fed. 690, 693 (C. C. S. D. Ga.); *Sanders* v. *Devereux,* 60 Fed. 311 (C. C. A. 8); *Frey* v. *Willoughby,* 63 Fed. 865 (C. C. A. 8); *Holton* v. *Guinn,* 65 Fed. 450, 454 (C. C. W. D. Mo.); *Brown* v. *Cranberry*

Iron & Coal Co., 72 Fed. 96, 98 (C. C. A. 4); *Chapin* v. *Sears*, 18 Fed. 814 (C. C. N. J.).

If a plaintiff's title was not recognized by the alleged co-tenants, it was necessary to have a determination of that issue prior to partition. In *Clark* v. *Roller*, 199 U. S. 541, this Court said (p. 545):

> So far as general principles go we certainly should not reverse the decision of the Court of Appeals that the petitioners ought to establish their title at law before partition should be decreed. * * * "A bill for partition cannot be made the means of trying a disputed title."

This rule has been somewhat relaxed by statute or decision in many states, and questions of title arising incidentally in a suit for partition can now often be tried in the partition proceedings.[2] But the question of title is not an incidental one in this case; petitioners' purpose in bringing this suit is to establish their claim to an interest in the land here involved (cf. R. 13). As the court below said (R. 170), "Regardless * * * of what plaintiffs may call their action, it is one primarily

[2] State legislation and judicial decisions broadening the scope of partition suits in equity are inapplicable in partition proceedings in the federal courts. *Matthews* v. *Rodgers*, 284 U. S. 521, 529; *Sanders* v. *Devereux*, 60 Fed. 311, 314–315 (C. C. A. 8); *Frey* v. *Willoughby*, 63 Fed. 865, 867 (C. C. A. 8). Otherwise the jurisdiction of the federal court over suits against the United States would vary from state to state and the liability of the United States to suit would depend upon the vagaries of state legislation.

to contest with the United States its title to, and its exclusive possession of, the lands involved. It is a suit to try title with partition as an incident, to be decreed only if and when the plaintiffs succeed in establishing in them a title superior to that of the United States." Such a proceeding is not one to which Congress consented in enacting section 24, paragraph 25 of the Judicial Code. It follows, therefore, that the suit was rightly dismissed for want of jurisdiction.

CONCLUSION

The question presented was correctly decided by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
J. EDWARD WILLIAMS
Acting Head, Lands Division.
VERNON L. WILKINSON,
WILMA C. MARTIN
Attorneys, Department of Justice.

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